

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**No. 16-CV-00564-WJ-SMV
No. 14-CR-03259-WJ**

NATALI ARVILLA CASTRO,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant Natali Arvilla Castro's Request for Permission to File a Successive § 2255 Pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, No. 15-6418, S. Ct. April 18, 2016. [CV Doc. 1; CR Doc. 39]. Defendant contends that her sentence was enhanced under the career offender provision of the United States Sentencing Guidelines, U.S.S.G. § 4B1.2, and requests permission to file a second or successive motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in light of the United States Supreme Court's recent decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016).

Pursuant to a plea agreement, Defendant pleaded guilty to conspiracy to possess with intent to distribute a mixture and substance containing a detectable amount of methamphetamine, contrary to 21 U.S.C. § 841(b)(1)(c). [CR Docs. 35, 36]. The Court adopted the findings in the Presentence Investigation Report and sentenced Defendant to 45 months of imprisonment. [CR Docs. 32, 36]. Judgment was entered on July 31, 2015. [CR Doc. 36]. Defendant did not

appeal her conviction or sentence and has not previously filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

Because this is Defendant's first § 2255 motion, she does not need permission from the Tenth Circuit Court of Appeals to file a second or successive § 2255 motion. *See* 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals"). However, in *Castro v. United States*, 540 U.S. 375 (2003), the United States Supreme Court held that when

a court recharacterizes a pro se litigant's motion as a first § 2255 motion[,] the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restriction on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims [s]he believes [s]he has.

Id. at 383 (italics omitted). Therefore, consistent with *Castro*, the Court will notify Defendant that it intends to recharacterize her motion for permission to file a successive § 2255 motion as a first § 2255 motion and afford Defendant an opportunity to withdraw the motion or to amend it to add additional claims. *See* Rule 2 of the Rules Governing Section 2255 Proceedings for the United States District Courts (providing that a motion to vacate, set aside, or correct sentence must: "(1) specify all grounds for relief available to the moving party; (2) state the facts supporting each ground; (3) state the relief requested; (4) be printed, typewritten, or legibly handwritten; and (5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant"). If Defendant fails to timely amend or withdraw her motion, then Defendant's motion will be recharacterized as a first § 2255 motion, and any subsequent § 2255

motions will be subject to the restriction on “second or successive” motions in 28 U.S.C. §§ 2244 and 2255(h).

IT IS THEREFORE ORDERED that Defendant is granted leave to amend or withdraw her motion [CV Doc. 1; CR Doc. 39] (which the Court intends to recharacterize as a first motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255) no later than **July 18, 2016**.

IT IS FURTHER ORDERED that the Clerk of the Court mail to Defendant, together with a copy of this Order, a form § 2255 motion and instructions.

IT IS SO ORDERED.



STEPHAN M. VIDMAR
United States Magistrate Judge